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No. 85-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

QUIVIRA MINING COMPANY,
HOMESTAKE MINING COMPANY OF CALIFORNIA,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY MEMORANDUM FOR THE PETITIONERS

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ARGUMENT

This case presents a question as to the limits of the jurisdiction of the U.S. Environmental Protection Agency ("EPA") under the Clean Water Act ("CWA"). EPA asserts that groundwater that is pumped from petitioners' uranium mines and then

released (after treatment) to a normally dry arroyo is subject to the CWA. EPA claims that "relatively rare" flooding (Pet. App. at 10a, 25a) and groundwater flow over the course of centuries might establish a connection with another waterway -- an ephemeral stream that is occasionally and indirectly linked to a navigable-in-fact river. Respondent seeks to sustain this extraordinary assertion of federal authority by coloring the facts and by stretching the case law. Indeed, the reasoning of this Court's decision in *United States* v. *Riverside Bayview Homes, Inc.*, 54 U.S.L.W. 4027 (No. 84-701, Dec. 4, 1985), confirms the error of the court of appeals below.

1. Respondent concedes, as it must, the facts demonstrating the attenuated linkage between the discharges and interstate commerce. The respondent makes certain other assertions of fact, however, that may mislead this Court:

a. The respondent states that Homestake's uranium mill site has been listed as "one of the top-priority sites in the nation containing hazardous substances, due to contamination of groundwater by uranium" (Resp. Br. at 2 n.2), thereby creating the impression that the discharges at issue have resulted in extensive contamination. In fact, however, the so-called Homestake mill is nearly twelve miles from the operations (and the discharges) at issue here. The alleged impacts of the Homestake mill are simply irrelevant to the validity of the NPDES permits. Moreover, the groundwater from the mines is processed through ion-exchange plants to recover any uranium content and is treated to remove other constituents

before release (Jt. App. 17, 48, 102, 115-16).[1] There have been no allegations of substantial groundwater contamination resulting from the discharges.

b. Respondent asserts that petitioners applied for and were issued discharge permits, and only "later concluded that they were exempt from the Act's permit requirements" (Resp. Br. at 4). The record below demonstrates, however, that although Quivira's predecessor filed an application for a permit in order to comply with a filing deadline, it questioned EPA's jurisdiction at the very outset (Jt. App. at 12). The challenge to EPA's authority was repeated over the years throughout the slow processing of the applications (Jt. App. 63, 80, 95). Any implication of acquiescence to EPA jurisdiction or of waiver is incorrect.

2. Respondent seeks to justify the decision below by arguing that it is "strongly supported" by two previous decisions: *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975), and *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974). (Resp. Br. at 10; *see id.* at 8-10). Neither case can bear the burden that respondent would impose:

a. The *Phelps Dodge* court ruled on a motion to dismiss a criminal suit for an alleged violation of the CWA. The defendant argued that the term "waters of the United States," 33 U.S.C. § 1362(7), was unduly vague. 391 F. Supp. at 1186. Although finding the issue "close," *id.* at 1184, the *Phelps Dodge* court

[1]The citation refers to the Joint Appendix that was filed with the court of appeals. A copy of the Joint Appendix has been lodged with the Clerk.

concluded that the Act encompasses discharges into normally dry arroyos "where any water which might flow therein *could reasonably end up* in any body of water, to which or in which there is some public interest . . ." *id.* at 1187 (emphasis added). Further, the court stressed the need for significant contact with interstate commerce; it defined the term "waters of the United States" to include normally dry arroyos through which water may flow "where such waters *will ultimately end up* in public waters." *Id.* (emphasis added). Because any surface flow in the arroyos at issue here reaches another stream, at best, "relatively rarely," *Phelps Dodge* would not justify federal jurisdiction. Indeed, when the *Phelps Dodge* case proceeded to trial, the court granted a motion for a judgment of acquittal from the bench, rejecting the Government's contention that the discharge of all pollutants is illegal.[2]

b. The Sixth Circuit decision in *Ashland Oil* is also unavailing to the respondents. In considering the scope of coverage of the CWA, the court emphasized that "Congress was concerned with pollution of the *tributaries* of navigable streams." 504 F.2d at 1329 (emphasis added). In light of the fact that the necessary tributary relationship existed between the discharge and a navigable-in-fact river, *id.* at 1320, the court concluded that the CWA properly applied, *id.* at 1329. But, contrary to the respondent's argument, *Ashland Oil* does not justify the application of the CWA where a tributary relationship does not exist. And it hardly can justify the Regional Administrator's

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[2]The relevant portion of the *Phelps Dodge* transcript is set out as Exhibit 2 to the petitioners' brief in the court of appeals. A copy of the brief has been lodged with the Clerk.

conclusion that the Act encompasses discharges to any "geomorphic features capable of transporting pollutant laden water to an area in which interstate commerce may be affected," regardless of the likelihood of flow (Pet. App. at 12a, 25a).

3. The reasoning of this Court's recent decision in *United States* v. *Riverside Bayview Homes, Inc.*, 50 U.S.L.W. 4027 (No. 84-701, Dec. 4, 1985), also demonstrates the error of the court below. *Riverside Bayview Homes* addressed the validity under the CWA of a regulation of the Army Corps of Engineers that defined "waters" subject to the CWA to include wetlands adjacent to waters, regardless of the frequency of flooding. The Court upheld the regulation, but only after an examination of the legislative history and underlying policies of the statutory grant of authority. The legislative history demonstrated that Congress had explicitly refused to narrow the definition of the wetlands subject to the Act. *Id.* at 4031-32. And the policies of the CWA were seen to be furthered by including all adjacent wetlands, regardless of the frequency of flooding, because such wetlands provide a significant aquatic habitat and affect water quality by filtering and purifying water and by slowing erosion. *Id.* at 4030-31.

The same analysis demonstrates the error of the court of appeals here. The legislative history shows no suggestion that Congress intended federal jurisdiction to attach in the instant circumstances (Pet. at 7-9). Moreover, the purposes of the CWA cannot be furthered by regulating discharges that have, at best, negligible flow to other waters.

CONCLUSION

In light of the foregoing, the petition should be granted.

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